85-1345

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

J. A. CROSON COMPANY,

Petitioner,

v.

CITY OF RICHMOND,

Respondent.

BRIEF IN OPPOSITION

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Question Presented

1. Does a City of Richmond ordinance requiring thirty percent (30%) minority business enterprise participation in the City of Richmond construction contracts comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

A. Evidence 2

B. Argument

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI IN THE CASE BECAUSE THE ISSUES RAISED HEREIN HAVE BEEN SETTLED BY THIS COURT AND THE COURTS OF APPEAL.

I 4

II 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

CASES

Fullilove v. Klutznick,
448 U.S. 448 (1980) 5,6,7,8,10

Ohio Contractors Ass'n v. Keip,
713 F.2d 167 (6th Cir. 1983) 9

Schmidt v. Oakland Unified School Dist.,
662 F.2d 550 (9th Cir. 1981),
vacated on other grounds, 457 U.S. 594
(1982). 8,9

*South Florida Chapter of the
Associated Gen'l Contractors
of America, Inc. v. Metropolitan
Dade County Florida*,
723 F.2d 846 (11th Cir.), *cert. denied*
____ U.S. ___, 105 S.Ct. 220 (1984) 6,7,9,10

*Southwest Washington Chapter, Nat'l
Elec. Contractors Ass'n v. Pierce County*
667 P.2d 1082 (Wash. 1983) 7

UNITED STATES CONSTITUTION

Fourteenth Amendment 1,5,8,9

STATUTES

28 U.S.C. Section 1331 1

28 U.S.C. Section 1441(a). 1

42 U.S.C. Section 6705(f) (2) 5

Richmond, Virginia Code, Ch. 24.1 *et seq* 2

Richmond, Virginia Code, Ch. 24.1,
Article VIII-A(C) 2,3

Richmond, Virginia Code, Ch. 24.1,
Article I(F) (Part B) (27.10,27.20) 2

Virginia Code Sections 11-35 *et seq* 1

STATEMENT OF THE CASE

This case arose out of an action instituted by J. A. Croson Company (hereinafter "Croson") in the Circuit Court of the City of Richmond. The City of Richmond (hereinafter "City") removed the case to the United States District Court for the Eastern District of Virginia, Richmond Division, pursuant to 28 U.S.C. Section 1441(a). The federal district court assumed jurisdiction over the federal constitutional claims pursuant to 28 U.S.C. Section 1331 and pendent jurisdiction over the state law claims.

Croson challenged the legality of the City's Minority Business Utilization Plan (hereinafter "Plan") under the Fourteenth Amendment to the United States Constitution.

Croson asserted that the Plan violated the Virginia Public Procurement Code, Virginia Code Sections 11-35 *et seq.*

Croson further alleged that the City applied the Plan to Croson in an arbitrary and discriminatory manner.

The case was heard before the Honorable Robert R. Merhige, Jr., who decided the case upon motions for summary judgment and depositions filed by the parties on December 3, 1984. The trial court upheld the validity of the Plan under both the United States Constitution and Virginia law. App. 110.

On November 25, 1985 the United States Court of Appeals affirmed the decision of the district court. App. 1.

Croson now petitions this Court for a writ of certiorari.

A. EVIDENCE

On April 11, 1983, the Council of the City of Richmond (hereinafter "Council") amended its public procurement ordinance (Richmond, Va. Code, Ch. 24.1 *et seq.*) by adding the Plan. The Plan states that

> All contractors awarded construction contracts by the City shall subcontract at least thirty percent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

Richmond, Va. Code, Ch. 24.1, Article VIII-A(C).

Minority business enterprises (hereinafter "MBEs") are defined as stock corporations in which at least fifty-one percent (51%) of the stock is owned and controlled by Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts. Richmond, Va. Code, Ch. 24.1, Art. I(F) (Part B) (27.10,27.20).

The purpose of the Plan is to promote "wider participation by minority business enterprises in the construction of public projects." Richmond, Va. Code, Ch. 24.1, Art. VIII-A(C). The Plan expires by its own terms on June 30, 1988. App. 248.

The Council enacted the Plan after an administrative study revealed that MBEs had been awarded 0.67% of all City construction contracts over the previous five (5) years. App. 38. Council held a public hearing where numerous individuals, including construction contractors and trade guild representatives, spoke for and against the Plan prior to its adoption. App. 38-39. There was unrebutted testimony of race discrimination in the Richmond construction industry by witnesses who spoke at the Council hearing. App. 38. The Plan was adopted by Council by six (6) affirmative votes, two (2) negatives and one (1) abstention.[1]

On September 6, 1983, the City issued an invitation to bid (hereinafter "Bid") for plumbing work at the City Jail.

[1]The Court of Appeals incorrectly stated that the Council vote was 6-3. App. 38-39.

Fixtures from either Acorn Engineering Company or Bradley Manufacturing Company were specified. The Bid also mandated thirty percent (30%) MBE participation as required by the Plan. App. 7.

Croson, an Ohio mechanical and plumbing contractor, submitted the only bid for the City jail plumbing job. App. 9. However, Croson's bid did not include any MBE participation as required by the terms and conditions of the Bid. Six (6) days after offering its bid, Croson requested a waiver of the MBE participation requirement. App. 9-10. In its request for a waiver, Croson stated that there were no minority suppliers available to provide the needed plumbing fixtures. App. 10-11.

In reviewing Croson's waiver request, City officials learned of a local MBE supplier who actively sought to provide Croson with the plumbing fixtures required by the Bid. It was subsequently learned that several in-state MBEs were available and interested in supplying Croson with the required fixtures. App. 7-8.

City officials decided against awarding the contract to Croson after the company refused to engage MBE participation on the project. City officials informed Croson that the City jail plumbing job would be re-bid, and invited that company to resubmit a bid. App. 12. Croson filed an untimely request for an administrative hearing. The City denied Croson a hearing. It then filed this action against the City in Richmond Circuit Court. App. 12.

B. ARGUMENT

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI IN THE CASE BECAUSE THE ISSUES RAISED HEREIN HAVE BEEN SETTLED BY THIS COURT AND THE COURTS OF APPEAL.

I

This Court settled the question of the validity of MBE set asides under the Equal Protection Clause of the Fourteenth Amendment in the case of *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In *Fullilove*, this Court upheld the ten percent (10%) set aside provision of the federal Public Works Employment Act, ("PWEA"), 42 U.S.C. Sec. 6705(f) (2). That provision required state and local governments applying for public grants for public works projects to provide assurances that at least 10% of the grant would be expended through MBEs.

In upholding the PWEA program a majority of this Court did not agree upon a standard of review for judicial review of set-aside plans. The Chief Justice writing for himself and Justices Powell and White, employed a three-part standard, examining the statute in order to determine whether (1) the purpose of the program was remedial, i.e., designed to eliminate practices that might serve to perpetuate the effects or prior discrimination, (2) the objective was within Congress' authority, and (3) the means employed were "narrowly tailored" to achieve the remedial goal. *Fullilove*, 448 U.S. at 493, 490.

In his concurring opinion, Justice Powell utilized a strict scrutiny standard to determine whether there was a compelling state interest in the adoption of set-aside programs. Five factors included in Justice Powell's strict scrutiny test were (1) the efficacy of alternative remedies, (2) the planned duration of the plan, (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, (4) the availability

of waiver provisions if the hiring plan could not be met, and (5) the effect of the set-aside plan on innocent third parties. *Id.* at 510-11, 514-15.

Justice Marshall, writing for Justices Brennan and Blackmun, stated that an intermediate level of scrutiny should govern judicial review of minority set-aside programs. *Id.* at 519.

In the case *sub judice*, the Fourth Circuit and district court utilized the approach employed by the Eleventh Circuit in analyzing minority set-aside programs. *See South Florida Chapter of the Associated Gen'l Contractors of America, Inc. v. Metropolitan Dade County Florida*, 723 F.2d 846 (11th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 220 (1984). App. 29-30. The Eleventh Circuit analysis incorporated the concerns articulated in the three plurality opinions of *Fullilove*. This test requires that

> (1) the governmental body have the authority to pass such legislation; (2) [that] adequate findings have been made to ensure that the government body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; (3) [that] the use of such classification extend no further than the established need of remedying the effects of past discrimination.

South Florida, 723 F.2d at 851-52.

Utilizing the *South Florida* test, the Fourth Circuit and district courts found that the City did have authority under state law to enact the Plan. App. 15-21.

Second, the Fourth Circuit and district courts found that the Council had before it historical records and a statistical study which indicated that minorities, who constituted more than fifty percent (50%) of the City's population, had received over the preceding five years only 0.67% of the City's construction contracts. Witnesses at

the council hearing asserted that race discrimination existed in the Richmond construction industry. App. 38-39. The courts found more than adequate evidence of past discriminatory practices, and that the 30% MBE participation goals effectuate a remedy for the discrimination without advancing one group's interest over another. App. 40.

Third, the Fourth Circuit and district courts found that "the establishment of a 30% set-aside requirement for a five-year period, with adequate waiver provisions [was] reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." App. 43-44. In reaching this decision the Fourth Circuit relied on *Fullilove,* 448 U.S. at 513-14 (10% set aside reasonable, where 17% of the population and 4% of contractors were minority group members); *Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County,* 667 P2d 1082, 1101 (Wash. 1983) (MBE participation goal of 11% set at slightly less than county's minority population held reasonable); *Schmidt v. Oakland Unified School Dist.,* 662 F.2d 550, 559 (9th Cir. 1981), *vacated on other grounds,* 457 U.S. 594 (1982), (25% goal reasonable in light of city's 34.5% non-white population; decision vacated for failure to reach merits of statutory issue prior to deciding constitutional claim).

Croson argues that the Plan is not narrowly tailored. However, no alternative plans have been suggested to alleviate past discriminatory practices in the Richmond construction industry. As Justice Powell noted, the Supreme Court "has not required remedial plans to be limited to the least restrictive means of implementation." *Fullilove,* 448 U.S. at 508.

Finally, the Fourth Circuit found that the Plan's five (5) years term with a waiver provision provided the assurance that a permanent preference would not be granted "to one racial group, but to offer a narrowly tailored, finite remedy of the current effects of past discrimination." App. 44.

It is clear that the Plan comports with the Equal Protection Clause of the Fourteenth Amendment even under the strict scrutiny test of Justice Powell in *Fullilove*. The Plan was applied fairly to Croson when it submitted its bid for the City Jail project. Croson attempted to circumvent the 30% MBE participation requirements of the Bid by first stating that there were no MBEs available to participate in the jail project, and later alleging that the MBEs were not qualified. The Fourth Circuit and trial courts found that MBEs were available and qualified to work with Croson. The City gave Croson extensions of time to obtain MBE participation, but this contractor was determined to defy this specification of the Bid. Even after all bids were rejected, the City invited Croson to re-bid.

II

Croson notes in its petition for a writ of certiorari that several circuits have considered the issue of validity of MBE set asides under the Equal Protection Clause of the Fourteenth Amendment. The Fourth Circuit decision in this case is consistent with other circuits, *e.g., South Florida, supra,* (11th Cir. 1984); *Ohio Contractors Ass'n v. Keip,* 713 F.2d 167 (6th Cir. 1983); *Schmidt v. Oakland Unified School District, supra,* (9th Cir. 1981). Clearly, all issues raised by Croson have been resolved by this Court and various courts of appeal. The factual questions raised herein by Croson are so insubstantial as not to require further argument.

CONCLUSION

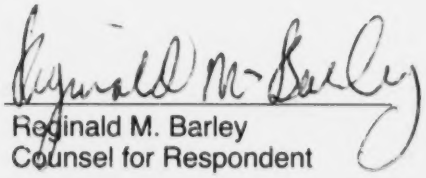
The petitioner Croson requests this Court to revisit issues which have been authoritatively determined in *Fullilove v. Klutznick,* 448 U.S. 448 (1980). It does so in the face of consistent application of the *Fullilove* decision among the circuits, in a manner unfavorable to Croson's position. Moreover, Croson's request for review follows closely on the heels of this Court's denial of a petition for writ of certiorari in *South Florida Chapter of the Associated Gen'l Contractors of America, Inc. v. Metropolitan Dade County, Florida,* 723 F.2d 846 (11th Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 220 (1984).

For all of the reasons stated in the argument above, the City of Richmond's Minority Business Utilization Plan should continue in effect until it terminates by its own force on June 30, 1988. The City of Richmond therefore respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

CITY OF RICHMOND,

Respondent

By 
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief in Opposition was hand-delivered to Walter H. Ryland, Esquire, Williams, Mullen & Christian, P. O. Box 1320, 919 East Main Street, Richmond, Virginia 23210, this 10th day of March, 1986.

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